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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 288

THOMAS BASS, ... Petitioner

vs.

COMMONWEALTH OF KENTUCKY, . Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

ZEB. A. STEWART,
Corbin, Kentucky,
Counsel for Petitioner.

The undersigned counsel for Petitioner, hereby certifies that he has delivered a copy of the within petition for writ of certiorari to Honorable Eldon S. Dummitt, Attorney General of the Commonwealth of Kentucky, at Frankfort, Kentucky, this 22nd day of July, 1944.

ZEB. A. STEWART.

Roberts Printing Co., Frankfort, Ky.

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688; Pyle vs. State of Kansas, et al., No. 50, 63 Sup Ct. Rep.; Mooney vs. Holohan, 294 U. S. 103; Anderson vs. U. S. 63 Sup. Ct. Rep. Advance, issue of March 15, 1943, and cases cited in Ashcraft, McNabb, and Anderson opinions, supra, Section 50, Kentucky Criminal Code of Proceedure; Bennett vs. Com. of Ky., 226 Ky. 529; Com. vs. McClanahan, 153 Ky. 412; Lett vs. Com., 284 Ky. 267; Butler vs. Com., 284 Ky. 276; McIntosh vs. Com., 257 Ky. 465 (quoted from).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

THOMAS BASS - - - - - - - - - *Petitioner*

vs.

COMMONWEATH OF KENTUCKY - - - *Respondent*

PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Your petitioner, Thomas Bass, respectfully shows:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner, Thomas Bass, is an uneducated young negro, a native of South Carolina, and at the time of his arrest, June 17, 1942, and his indictment on July 1, 1942, was a soldier in the army of the United States,

and a member of the Medical Detachment stationed at Bowman Field near Louisville, Kentucky. Petitioner is now confined in a death cell in the State Penitentiary at Eddyville, Kentucky, under a sentence of death pronounced by the Criminal Division of the Circuit Court of Jefferson County, Kentucky, upon an indictment, trial and conviction for the alleged murder of one John Brown, also a man of color, which alleged crime is alleged to have been committed about 5:30 P. M. June 17, 1942, in the city of Louisville, Kentucky. Upon the return of the verdict of the jury and before judgment had been entered thereon, petitioner by his then counsel filed motion and grounds for new trial wherein it was urged (A) that the verdict was flagrantly against the law and the evidence (B) improper, and prejudicial argument of the attorney for the Commonwealth in his final argument of the case to the jury. Motion and grounds for new trial having been overruled and exceptions saved, petitioner in due time prosecuted an appeal to the Court of Appeals of Kentucky, the court of last resort in the Commonwealth, which court on January 21, 1944, affirmed the judgment of the trial court, which opinion is published in 177 Southwestern, Second Series, at Page 386, 296 Ky. 426. A copy of said opinion is attached hereto and made a part of this petition marked "A." Petition for rehearing of said cause was duly filed and overruled on April 25, 1944, without expression of opinion of the Federal questions and other questions presented in the petition for rehearing. A printed copy of petition for rehearing is filed herewith. The Court of Appeals on May 23, 1944, granted a stay of execution of sentence pending the outcome of this proceeding in this court (Volume 1, P. 38, typewritten transcript of record herein). A complete typewritten

transcript of the record of the case in the Court of Appeals including briefs, duly certified by the clerk of that court has been filed in the office of the clerk of the Supreme Court. Petitioner, as shown by his briefs and argument on appeal to the Court of Appeals (which are copied into the record on file herein) seasonably and properly raised and presented in argument and briefs the Federal questions relied upon in the present proceeding in this court wherein petitioner contends:

That he has been denied due process and equal protection of the law guaranteed him as a citizen of the United States, by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and by Sections Seven and Eleven of the Constitution of the Commonwealth of Kentucky, and especially in that your petitioner at his trial was compelled to give evidence against himself by reason of the trial court admitting as evidence before the jury an alleged written confession of the crime charged, which alleged confession was procured from petitioner while in custody of some five or six policemen and detectives of the city of Louisville, by "sweating," assaults, intimidation, putting in fear, "plying with questions" and threats of death, which methods of obtaining evidence is prohibited, denounced and condemned by Section 422.110 Kentucky Revised Statutes (Section 1649-b-1 to b-3 Carroll's Kentucky Statutes) Act of Kentucky General Assembly of 1912, as amended by Act of 1942, which statute is entitled, viz: "Confession obtained by 'sweating' not admissible."

This statute (422.110) reads as follows:

(1) "No peace officer, or other person having lawful custody of any person charged with crime, shall attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions, or extort information to be used against him on his trial by threats or other wrongful means, nor shall the person having custody of the accused permit any other person to do so."

(2) "A confession obtained by methods prohibited by section (1) is not admissible as evidence of guilt in any court."

Section 422.990 Kentucky Revised Statutes (Carroll's Statutes, Section 1649-b-4) provides:

"Any person who violates KRS 422.110 shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned for not less than ten nor more than sixty days, or both."

The testimony of the police officers and detectives who "worked the case up" (Pages 11 to 24, 36 to 42, Volume Two (2) typewritten transcript of Evidence, and the alleged "confession" itself (Tr. Ev. 43-45) admit that petitioner while in their custody was not taken before any "committing magistrate," but that he was taken by them from jail to Police Headquarters on June 18, 1944, and there grilled, "plied with questions" and by assaults, threats of death and Third Degree methods, and in violation of this penal statute forced to sign the alleged confession admitted in evidence by the trial court. The evidence also shows that defendant was not afforded the opportunity of counsel nor was he warned that any thing he might say would

be used in evidence against him at his trial. Petitioner testified in his own behalf at his trial in part as follows (Volume 1 typewritten transcript of Evidence, P. 27):

> "When they (policemen and detectives) got me over there (Police Headquarters) the fellows —two or three 'laws' over there—drawed a black jack on me and pistol and said they were going to kill me if I didn't say I was going to rob the man * * * they said they were going to kill me if I didn't say I hit him to rob him. They said 'if you hit the man you robbed him, didn't you rob him' and drawed back and hit me with a black jack, and said 'you must say you robbed him.'"

It was petitioner's theory of the case and he so testified, that the deceased, Brown, invited him into his room and brought on the difficulty, reached for a pistol on the bed, and petitioner in his own necessary self-defense struck deceased with a hammer to repel the assault, and from which wound inflicted in self-defense, death ensued. Petitioner further contends that he was denied the right of trial by jury in violation of the Sixth Amendment to the Federal Constitution of the vital question of fact in issue under his plea of not guilty as to whether the alleged confession was or was not, voluntary or involuntary, in other words, was the alleged confession obtained in violation of the "Anti-Sweating Act?" The trial court admitted the alleged confession in evidence but failed to instruct the jury for its determination whether it was voluntary or involuntary, so that with its admission in evidence with no admonition or instruction from the court, the defendant with the alleged confession before it, stood admittedly guilty notwithstanding his own evidence on

the stand that he was forced by threats of death and assaults to admit guilt.

JURISDICTION

The jurisdiction of this court rests upon Section 237-B of the Judicial Code, as amended by Act of 1925, 43 Statute, 937 (U.S.C. Title 28, Section 344-B). Petitioner contends that the judgment sought to be reviewed was final, and necessarily decided adversely to petitioner substantial Federal questions which were properly presented by the record in briefs and argument on appeal and for rehearing, and petitioner has exhausted his remedy in the courts of Kentucky. Petitioner contends that he has been denied the equal protection and due process of law guaranteed by the 5th, 6th and 14th Amendments to the Constitution of the United States, and in plain and open disregard of "those fundamental principles of liberty and justice" guaranteed by the Federal Constitution as well as by Section Eleven (11) of the Constitution of the Commonwealth of Kentucky, and the Statutes aforesaid. The following cases among others, sustain the jurisdiction of this court, viz:

> Ashcraft et al. vs. State of Tennessee, Advance Sheet Supreme Court Reporter, issue of May 15, 1944, decided May 1, 1944, wherein it is held that the question of the voluntariness or involuntariness of an alleged confession was a question of fact for the jury, as also held in the recent case of Lyons vs. State of Oklahoma, decided June 5, 1944, reported in Advance Sheet of Supreme Court Reporter, issue of July 1, 1944, Vol. 64, No. 16; McNabb et al. vs. United States, Advance Sheet Supreme Court Reporter, Vol. 63, No. 9, Page 608, issue of March 15, 1943, 318 U. S. 608.

and cases cited in McNabb opinion; Brown vs. Mississippi, 297 U. S. 278; Chambers vs. State of Florida, 309 U. S. 227; Hysler vs. Florida, 62 U. S. 688; Pyle vs. State of Kansas et al. No. 50, 63 Sup. Ct.; Mooney vs. Holohan, 294 U. S. 103; Anderson vs. United States, 63 Sup. Ct. Advance, issue of March 15, 1943, and cases cited in McNabb and Anderson opinions.

Even in all previous cases adjudicated by the Court of Appeals of Kentucky, wherein the voluntariness or the contrary of similar alleged confessions have been admitted in evidence and refuted by a defendant at his trial, the Court of Appeals has consistently held until the opinion in the instant case, that the question of the voluntariness or the contrary of an alleged confession out of court was a question solely of fact to be determined by the jury under proper instructions of the trial court. Among such holdings are the following cases, viz: Bennett vs. Commonwealth, 226 Ky. 529, 11 S. W. (2) 437; Commonwealth vs. McClanahan, 153 Ky. 412, 155 S. W. 1131; Lett vs. Commonwealth, 284 Ky. 267, 144 S. W. (2) 505; Butler vs. Commonwealth, 284 Ky. 276, 144 S. W. (2) 510; McIntosh vs. Commonwealth, 257 Ky. 465, 76 S. W. (2) 320. In the McIntosh case, supra, the Court of Appeals wrote in its opinion, viz:

> "The rule in this jurisdiction is that, when there is a conflict of evidence as to whether the confession was voluntarily made, or obtained by threat, intimidation or in any manner by duress, the question of fact should be submitted to the jury, leaving to their consideration the conflicting evidence and its effect in case of belief or disbelief" (citing many of the foregoing cases). Continuing the McIntosh opinion:

> "Accordingly the court erred in eliminating the testimony from the consideration of the jury under an appropriate instruction."

The failure of the trial court to submit for the jury's determination this vital fact question was not only violative of the Sixth Amendment to the Federal Constitution, and Section 11, Bill of Rights of the Kentucky Constitution, but was in total disregard of Section 180 of the Kentucky Code of Criminal Proceedure, which provides as follows:

> "Issues of law shall be tried by the court. Issues of fact, in prosecution for offenses of which the punishment is limited to a fine of sixteen dollars, shall be tried by the court. *All other issues of fact shall be tried by a jury.*"

In Kentucky, the rule is in criminal cases that it is the duty of the court whether so requested or not, to instruct the jury as to all the law of the case where there is any evidence bearing upon the issues. Had the trial court in the instant case have submitted this issue of fact to the jury it may have concluded from the evidence, and assuredly would have, the alleged confession was coerced, and procured in violation of the Anti-Sweating Act. As the case was tried this purely fact question was left to the arbitrary determination of the trial court. Due process as defined by the Kentucky Code of Criminal Proceedure, Section 50 was disregarded by the police officers in taking the defendant to police headquarters for inquisition and grilling, rather than before a committing magistrate of the city of Louisville or Jefferson county. The above section of the Code provides, viz:

> "When a person who has been arrested shall be brought, or, in pursuance of a bail bond, shall come, before a magistrate of the county in which the offense is charged to have been committed, the charge shall forthwith be examined."

Section 51 of the Kentucky Criminal Code, following Section 50 supra, regulating criminal proceedure, provides as follows:

> "The magistrate, before commencing the examination, shall state the charge, and inquire of the defendant whether he desires the aid of counsel, and shall allow a reasonable opportunity for procuring it."

No pretense was made by the police officers and detectives of the city of Louisville to observe the provisions of the Code of Criminal proceedure, although there were divers committing magistrates of the city and county of Jefferson having jurisdiction of the offense charged, and so far as this record discloses no commitment was ever made until the indictment by the grand jury on July 2, 1942, the police officers being content to conduct an inquisition of the defendant in order to "work up the case" to use the language of one of the police officers who testified at the trial. Although these officers testified that the alleged confession was voluntary, it does not appear anywhere in the evidence that this untutored negro boy who had formerly been confined in an insane asylum according to his evidence (Typewritten Tr. of Ev., P. 32) was warned by any of these officers that any thing he might say by way of culpability would be used against him at his trial, as was their duty to tell him. Nor was he advised that he was entitled to counsel nor given an op-

portunity to secure counsel. The alleged confession in question will be found at Pages 43-45 of Volume Two (2) typewritten transcript of record. A mere reading thereof, and an understanding of the way, manner, and circumstances of its obtention will be sufficient to convince any intelligent mind with any sort of knowledge of police and "Third Degree" methods that the same was obtained by methods condemned by the Statutes of the United States, the Commonwealth of Kentucky, and the courts of all civilized countries.

CONCLUSION

In view of the foregoing and this record, it is submitted that the writ of certiorari to the Court of Appeals of Kentucky should be granted, its judgment reversed and remanded to the said court there to be proceeded with according to law.

Respectfully submitted,

ZEB. A. STEWART,
Counsel for Petitioner.

July, 1944.

(10)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 288

THOMAS BASS, ... Petitioner

vs.

COMMONWEALTH OF KENTUCKY, . Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APEALS OF KENTUCKY

BRIEF FOR PETITIONER

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(I) The jurisdiction of this Court.

A. The judgment sought to be reviewed is final in character.

B. A substantial federal question was properly presented in the court below.

C. The judgment below did not rest upon an adequate non-federal ground.

D. The petition for writ of certiorari was filed in this Court within the time authorized by law.

(II) The merits of the case.

A. The trial court erred to the prejudice of the substantial rights of petitioner in admitting the alleged confession in evidence to the jury in plain violation of Section 422.110 Kentucky Revised Statutes.

B. No pretense was made by the arresting officers to observe or comply with provisions of Sections 45, 46, 50 and

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51 of the Kentucky Code of Criminal Proceedure requiring that the accused upon being arrested be taken before a "committing magistrate" for examination of the charge.

C. The trial court erred to the prejudice of petitioner's substantial rights in failing to submit to the jury by an instruction for the jury's determination the vital question and issue of fact as to whether the alleged "confession" was voluntary or coerced, or involuntary, or whether it was or was not, obtained in violation of the Anti-sweating Statute (Section 422.110 Kentucky Revised Statutes).

D. Petitioner was denied the Constitutional right to trial by jury of a question and issue solely of fact.

E. The Court of Appeals of Kentucky erred in its holding that the trial judge himself, and not the jury, was the sole trier and arbitrer of the vital fact question as to whether the alleged "confession" was voluntary or coerced in violation of the statute, supra.

F. It was the duty of the trial court to instruct the jury on all the law applicable to the case concerning which there was any evidence, and to instruct the jury on the defendant's theory of the case.

Conclusion 21

TABLE OF CASES CITED

Ammons vs. State, 80 Miss. 592.

Ashcraft vs. State of Tennessee, 318 U. S. 608, 64 S. Ct. 921.

Bass vs. Commonwealth of Kentucky, 177 S. W. (2) 386, 296 Ky. 426.

Bennett vs. Commonwealth, 226 Ky. 529, 11 S. W. (2) 437 (and cases cited in Bennett opinion).

Burman vs. Commonwealth, 289 Ky. 312, 156 S. W. (2) 131.

Butler vs. Commonwealth, 284 Ky. 276, 144 S. W. (2) 505.

Chambers vs. Florida, 309 U. S. 227, 60 Sup. Ct. 472, 84 L. Ed. 716.

McClanahan vs. Commonwealth, 153 Ky. 412, 155 S. W. 1131.

McIntosh vs. Commonwealth, also reported as Commonwealth vs. McIntosh, 257 Ky. 465, 76 S. W. (2) 320.

McNabb vs. United States, 64 Sup. Ct. Rep. Advance, issue of March 15, 1943, P. 613, 617, and cases cited in McNabb Opinion.

STATUTES CITED

Constitution of the United States, Fifth, Sixth and Fourteenth Amendments.

Constitution of Kentucky, Sections Seven and Eleven, Bill of Rights.

Judicial Code, Section 237 (b) as amended, Title 28, Section 344 (b).

Kentucky Code of Criminal Proceedure, Sections 45, 46, 50, 51, 180, 225.

Kentucky Revised Statutes, Section 422.110 (Anti-sweating Act).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 288

THOMAS BASS - - - - - - - - - *Petitioner,*

vs.

COMMONWEALTH OF KENTUCKY - - *Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR PETITIONER

OPINION BELOW

The Court of Appeals of Kentucky affirmed the judgment of the Criminal Division of the Circuit Court of Jefferson County, Kentucky, sentencing your petitioner to death by electrocution, in an opinion rendered January 21, 1944 (Petition for Rehearing denied April 25, 1944, without expression of opinion). The opinion is published in 177 Southwestern, Second Series, Page 386, 296 Kentucky Opinions, at Page 426. The original opinion is filed with and made part of the petition

herein, marked Exhibit "A" and is also copied into the Transcript of Record herein, Volume One (1) at Page 27.

JURISDICTION

The case is here on petition for writ of certiorari to review the judgment of the Court of Appeals of Kentucky which affirmed the judgment and sentence of conviction of the Jefferson Circuit Court. Petition for rehearing (printed copy of which is filed with the record in this court) was filed March 17, 1944, (R. Vol. 1, P. 36, typewritten Tr.) and overruled April 21, 1944 (R37) without expression of opinion. The petition for writ of certiorari was filed in this court July 24, 1944. The jurisdiction of this court rests upon Section 237-B of the Judicial Code as amended by Act of 1925 (U. S. C. Title 28, Section 344-B). Petitioner contends that the judgment sought to be reviewed was final, and necessarily decided adversely to petitioner substantial Federal questions which were properly presented by the record in briefs and argument on appeal, and for rehearing, and petitioner has exhausted his remedy in the courts of Kentucky, and that his petition for certiorari was filed in this court within the time authorized by law. He contends that he has been denied the equal protection and due process of law guaranteed him as a citizen of the United States, by the 5th, 6th and 14th Amendments to the Constitution of the United States, and in plain and open disregard of "those fundamental principles of liberty and justice guaranteed by the Federal Constitution, as well as by Section Eleven (11) of the Constitution of the Commonwealth of Kentucky, Section 422.110, Kentucky Revised Statutes (the Anti-Sweating Act of 1912 as amended) and by Sections 45,

46, 50, 51, and 180 of the Kentucky Code of Criminal Procedure.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There is therefore involved the foregoing constitutional provisions of both Federal and State constitutions and particularly the construction of Section 422.110 of the Kentucky Revised Statutes known as the Anti-Sweating Act and its applicability to the evidence in this case with reference to the admissibility in evidence of the alleged "confession" admitted in evidence on the trial of your petitioner and the failure and of the trial court to submit to the jury for its determination the vital question of fact as to whether such alleged "confession" was or was not coerced and involuntary and obtained from the petitioner by force, intimidation, and threats of bodily injury and death at the hands of policemen and detectives out of court and while in custody and jail and before arraignment, and without being warned or informed that any thing he might say would be used in evidence against him at his trial, and without being given any opportunity to procure counsel—methods condemned in numerous decisions of this court and other Federal and State courts, and even in all previous decisions of the Kentucky Court of Appeals, and notably by this court in the recent cases of McNabb, et al. vs. United States, Advance Sup. Ct., issue of March 15, 1943, 318 U. S. 608; Asheraft vs. State of Tennessee, Advance Supt. Ct. Rep. issue of May 15, 1944, Case No. 391, Vol. 64, P. 921, and cases cited in the McNabb and Asheraft opinions, all of which authority, statutory and constitutional provisions are deemed to have an important bearing in

this case and which are set forth in the index herein, as well as in the petition for writ of certiorari herein sought and prayed.

STATEMENT OF THE CASE

Petitioner, a young, uneducated negro soldier of the U. S. Army, a native of South Carolina, stationed with the Medical Detachment at Bowman Field, near Louisville, Kentucky, was indicted by the Grand Jury of the Criminal Division of the Circuit Court of Jefferson County, Kentucky, on July 1, 1942, for the crime of willful murder alleged to have been committed about 5:30 P. M. June 17, 1942, in the city of Louisville, by striking and killing one John Brown (also a man of color), with a deadly weapon, to-wit: a hammer, for the purpose, as alleged by the Commonwealth, of robbery. It was the petitioners theory of the case, and he so testified at his trial, had on September 30, 1942, on the issue made by his plea of not guilty (Vol. 1, P. 5, typewritten Tr. Record) that Brown had, a few minutes before the killing invited Bass into his (Brown's) room in a rooming house at 926 South 11th street in the city of Louisville, and while seated on a bed in the room Brown, the deceased, while in an intoxicated condition, brought on the difficulty engendered by Brown's jealousy of Bass because of the latter's attentions or relations with a negro woman named Bessie Young, with whom Brown was infatuated (and with whom according to the evidence Brown, and perhaps Bass also, had had adulterous relations), that Brown reached for a pistol which he had on the bed (later found concealed in the bed) whereupon petitioner, in order to repel the assault, and in his own necessary self-defense, picked up a hammer and struck Brown, from which striking and wounding

Brown died in a hospital in Louisville about 2:30 A. M. on June 18, 1942 (Vol. 2 Tr. Ev., P. 3). See also Bass' evidence in his own behalf (Vol. 2 Tr. Ev., P. 28, 29). Omitting the statements in the "extorted" and alleged "confession" admitted in evidence to the jury by the trial court, there was no evidence on behalf of the Commonwealth to successfully refute the testimony of Bass to the effect that he struck Brown in self-defense and then only after Brown in his intoxicated condition had provoked and brought on the difficulty, and was in the act of reaching for the pistol with which to shoot Bass. There were no eye witnesses to the difficulty. Outside the alleged confession admitted in evidence it is doubtful if the evidence was sufficient to take the case to the jury. But with the alleged confession admitted in evidence by the trial court to go to the jury without any admonition, instruction, or discretion left to the jury to determine for itself as a question purely of fact as to the voluntary or involuntary nature thereof or the circumstances of its obtention by force and threats at the hands of policemen and detectives, the defendant stood admittedly guilty by his own evidence as set forth in the extorted confession, and the action of the trial court in arrogating to itself the determination of a voluntariness of the alleged confession really amounted to an instruction to the jury to find the defendant guilty. This alleged confession is found at Page 43, 45 Vol. 2 Typewritten Tr. of Evidence. The instructions which the court gave to the jury are found at Pages 10 to 17 of Vol. One (1) Typewritten Transcript of the Record herein, from which it will be noted that the jury were given no discretion or instruction to determine for itself as to whether the alleged confession was voluntary or involuntary and obtained in violation of the Statute cited (The Anti-Sweating Act). The case was argued

by counsel for the Commonwealth and defendant and submitted to the jury which, by its verdict (Vol. 1, Tr. Record, P. 5) found petitioner guilty, as charged in the indictment and fixing his punishment at death. In due season petitioner filed motion and grounds for new trial (Vol. 1, Tr. R., P. 7, 8) which were overruled (Vol. 1, Tr. R., P. 6) and exceptions saved. Judgment and sentence of death by electrocution was pronounced (Vol. 1, Tr. R. 6). In due season petitioner prosecuted his appeal granted by the trial court to the Court of Appeals of Kentucky, the court of last resort in the state. The case was briefed and argued by counsel for appellant and the Commonwealth, and the Court of Appeals by its opinion of January 21, 1944, reported in 177 S. W. (2) 386, affirmed the judgment. This opinion is found at Pages 27, 34, Vol. 1, Tr. R., and a copy thereof is attached to and made part of petition for writ of certiorari herein. On March 17, 1944, petitioner filed his printed petition in the Court of Appeals for rehearing (copy of which is attached to the record in this court) which petition for rehearing was overruled on April 21, 1944, without expression of opinion.

ASSIGNMENT OF ERRORS

1. The trial court erred to the prejudice of the substantial rights of petitioner in admitting in evidence and to go to the jury, the alleged "confession" of the defendant obtained from him by policemen and detectives by inquisitorial methods while in custody and confined in jail, by threats, extortion, and brutal Third Degree methods at Police Headquarters, without affording defendant the benefit of counsel and without any warning that any thing he might say would be used in evidence against him on his trial, in plain disregard

of the provisions of Kentucky Revised Statutes, Section 422.110, Supra, and without observing or making any attempt to observe the mandatory provisions of Sections 45, 46, 50 and 51 of the Kentucky Code of Criminal Proceedure (specifically set out on Pages 8, 9 of the petition for certiorari herein).

2. The trial court further erred to the prejudice of the substantial rights of petitioner in failing to instruct the jury in substance that if the jury believed from the evidence that the alleged "confession" was procured by methods prohibited by the Statute aforesaid, it should disregard same.

3. The trial court further erred to the prejudice of the substantial rights of petitioner in failing and refusing to permit the jury to determine for itself the vital question of fact at issue in the case, and the defendant's theory of the case, as to whether the alleged confession was or was not coerced in violation of the Statute, which denial and refusal amounted to a denial of trial by jury of a question of fact and violated the Sixth Amendment of the Constitution of the United States, and also violative of the Fifth and Fourteenth Amendments to the Federal Constitution, and due process, and Section Eleven (11) of the Constitution of the Commonwealth of Kentucky, providing for trial by an "imperial jury of the vicinage" of questions of fact in criminal cases, and this is true even assuming (as is not assumed) that the trial court did not err in admitting the alleged confession in evidence in the first instance.

4. The trial court erred further to the prejudice of the substantial rights of the defendant in its failure to instruct the jury as to the whole law of the case, and the defendant's theory of the case especially regarding the alleged confession, it being the duty of the trial

court whether so requested or not, to instruct the jury on the whole law applicable to the case on which there has been any evidence, and as held by the Court of Appeals in all previous decisions in construing Section 225 of the Kentucky Code of Criminal Proceedure, which in substance provides that the court shall "instruct the jury on the law applicable to the case, which shall always be given in writing."

5. The Court of Appeals also erred to the prejudice of the substantial rights of defendant, and its departure from its own well established and "settled maxims of law" and violation of due process and equal protection of the law, as it had held in all its previous decisions in applying and construing the "Anti-Sweating" Statute aforesaid, notably in the cases of Bennett vs. Commonwealth, 226 Ky. 529, 11 S. W. (2) 437; Commonwealth vs. McClanahan, 153 Ky. 412, 155 S. W. 1131; Lett vs. Commonwealth, 284 Ky. 267, 144 S. W. (2) 505; Butler vs. Commonwealth, 284 Ky. 276, 144 S. W. (2) 510, and McIntosh vs. Commonwealth, 257 Ky. 465, 76 S. W. (2) 320.

6. The failure of the trial court to submit to the jury for its determination the fact question as to the voluntariness or involuntariness of the alleged confession, was violative of Section Seven (7) of the Constitution and Bill of Rights of the Commonwealth of Kentucky, which declares, viz:

> "The ancient mode of trial by jury shall be held sacred and the right thereto remain inviolate."

7. Bass was the only witness in his own behalf; his unequivocal testimony (Vol. 2, P. 27, 28 R.) was, that he was threatened with death unless he would sign the confession admitting that he had killed Brown in

order to rob him, the policemen and detectives who extorted the confession from him and compelled him to sign it before a Notary Public testified that the same was voluntary. In the McIntosh case, supra, followed by all previous cases, the Kentucky Court of Appeals wrote:

> "The rule in this jurisdiction is that, when there is a conflict of evidence as to whether the confession was voluntarily made, or obtained by threat, intimidation or in any manner by duress, the question of fact should be submitted to the jury, leaving to their consideration the conflicting evidence and its effect in cases of belief or disbelief. Accordingly the court erred in eliminating the testimony from the consideration of the jury under an appropriate instruction."

8. The Anti-Sweating Statute (Kentucky Revised Statutes, Section 422.110) the violation of which is complained of as a question presented for consideration, reads as follows:

> (1) "No peace officer, or other person having lawful custody of any person charged with crime, shall attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions, or extort information to be used against him on his trial by threats or other wrongful means, nor shall the person havving custody of the accused permit any other person to do so."
>
> (2) "A confession obtained by methods prohibited by subsection (1) is not admissible as evidence of guilt in any court."

THE ALLEGED CONFESSION

This alleged confession is copied into Volume Two (2), Pages 43-45 of the typewritten Transcript of Evidence with the record herein and consists of Three (3) single spaced typewritten sheets, which the policemen and detectives who extorted it from Bass testified was voluntarily made by the accused is altogether too perfect to convince any intelligent mind that it was voluntarily made. It bears every ear mark of careful, deliberate and studied phraseology and preparation, so carefully worded and phrased by masters of the "Third Degree" so as to avoid the appearance of questioning or "plying" the accused with questions. A mere reading thereof and an examination of its mechanical arrangement and an understanding of the circumstances surrounding its obtention will be sufficient to satisfy the judicial conscience versed in the methods of police inquisitors that the very language employed was not the language of an untutored negro youth from the "Deep South." An examination of the testimony of the policemen and detectives on direct and cross- examination at the trial will be sufficiently convincing as we submit, to show that the confession was extorted in violation of the Statute. Testimony of Policeman Joe Brummett (Tr. Ev., P. 13). This officer testified he brought Bass from jail to police headquarters the next day after the difficulty. He repeatedly testified that Bass "admitted" the crime. How could he make an admission without being plied with questions in violation of the Act, and for the purpose of "obtaining information from the accused concerning his connection with or knowledge of crime" and "while in custody" of these peace officers? We also invite attention to the evidence of policeman E. J. Kneis whose testimony

appears at Pages 14 to 20 of Volume 2 Tr. Ev. and introduced the alleged confession in evidence. This witness was asked (P. 19) "Do you mean to say that this wording here is the words of this defendant?"

"A. Just the way he told it." Testimony of Detective Oda Pate (Tr. Ev., P. 20, 24). "Q. I will ask you if that statement was prepared by Officer McDonald as given to him by this defendant Bass." "A. Yes." This officer also testified that this ignorant negro made the further voluntary statement, towit: "I have made this statement of my own free will without any promises or threats from any one and have read same before signing it and it is true." Was Bass "plied with questions" by these policemen and detectives? Detective Pate further testified (P. 21, 22) in answer to the following questions, viz: "Q. Has this man up to this minute. this defendant up to this minute ever mentioned that Brown had a pistol, did he tell you all that night that Brown had a pistol? "A. No sir, there was no mention made of a pistol at any time during the probably an *hour and a half of questioning and talking to Bass.*" "Q. (P. 22) Do you remember how that statement about Brown having this gun, how it got into this record?" "A. The gun?" "Q. Yes, that he handed the gun to Brown?" "A. I can't recall any particular statement pertaining to a gun. *They could have put that in it.*" All the culpable statements alleged to have been voluntarily made by Bass, or attributable to him not only "could," but they undoubtedly were, just as this policeman testified "put in" by these interrogating officers. Bass, testifying in his own behalf, testified regarding this alleged confession as follows (Tr. P. 27):

> "When they (policemen and detectives) got me over there (to police headquarters where he was taken from the jail) the fellows—two or three 'laws' over there—drawed a black jack on me and pistol and said they were going to kill me if I didn't say I hit him to rob him. They said, 'if you hit the man you robbed him; didn't you rob him' and drawed back and hit me with a black jack, and said, 'you must say you robbed him.' "

Policeman Brummett further testified for the Commonwealth (Tr. P. 38) as follows:

> "No sir, the only thing we said to him, Captain Pate was the one that told the defendant there is an old man down there that is beat up and robbed and is dead, and the best thing you could do is to tell what you know about it, *it is for your own good.*"

Policeman Kneis further testified (Tr. Ev. P. 39): "Yes sir, I was the one that got the confession."

From all the testimony and considering the circumstances can any unbiased and unprejudiced mind doubt that this alleged confession was extorted by methods condemned by Statute and the opinions of all courts both Federal and State?

ARGUMENT AND AUTHORITIES

In the McClanahan case, 153 Ky. 412, 155 S. W. 1131, cited in the foregoing, the Court of Appeals in interpreting this Anti-Sweating Statute, wrote as follows:

> It will be observed that the "sweating" prohibited by the act may be done by the mere

questioning of the person under arrest charged with the crime concerning his connection therewith or knowledge thereof, if it be done for the purpose of extorting from him (i. e., inducing an unwilling or involuntary giving of) information to be used against him on his trial for such alleged crime. In enacting this statute it was the purpose of the Legislature to strike a blow at the modern methods, less harsh than threats, intimidation or promises of benefits to be conferred, condemned by the common law, that are employed by detectives and arresting officers to obtain information from those suspected of guilt or implicated in crime. Just as three centuries ago the use of the rack and other tortures for compelling confession of guilt were abolished in England, there is now a tendency to do away with the "sweat box" and other like methods that are calculated to make such confessions other than spontaneous."

The Kentucky court then proceeded in the McClanahan opinion to quote from the case of Ammons vs. State, 80 Miss. 592, as follows:

"Such proceedings as this record discloses cannot be too strongly condemned. They violate every principle of law, reason, humanity, and personal right. They restore the barbarity of ancient and medieval methods. They obstruct instead of advance, the proper ascertainment of truth. It is far from the duty of an officer to extort confession by punishment. On the contrary he should warn his prisoner that every statement he may choose to make may be used against him on his trial." "It (the act) is neither unreasonable or oppressive in effect but was designed to protect the individual citizen in a right guaranteed to him by Section 11, Bill of Rights, Constitution, which declares 'he can-

not be compelled to give evidence against himself.' "

In the very recent case of Burnam vs. Commonwealth, 289 Ky. 312, 156 S. W. (2) 131, rendered October 31, 1941, the Kentucky Court of Appeals said in the opinion:

> "As there was a sharp conflict in the evidence as to whether appellant voluntarily confessed to this crime, or whether the confession was extorted from him, the trial judge correctly submitted to the jury the question under an appropriate instruction which in effect told them not to consider the written confession for any purpose if they believed from the evidence that it was obtained by mistreatment of appellant condemned in the statute."

Again, in the case of Bennett vs. Commonwealth, 226 Ky. 529, 11 S. W. (2) 437, a very similar case in point of fact to the case at bar, and from the same division of the Jefferson Circuit Court, and where a death sentence was also inflicted, the Kentucky Court of Appeals wrote in its opinion, viz:

> "Under the rule prevailing at present in this jurisdiction, the preliminary question affecting the competency of the written confession should have been submitted to the jury under an instruction in effect directing the jury not to consider the written confession for any purpose, if they should believe that it was procured by treatment condemned by the statute, supra, as construed in the opinions cited." The Court citing in support of this holding the previous cases of Gilliland vs. Commonwealth, 224 Ky. 453, 6 S. W. (2) 467, and Billings vs. Com., 223 Ky., 381, 3 S. W. (2) 771.

Your Honors in opinion reversing the Supreme Court of Florida in the case of Chambers vs. Florida, 309 U. S. 227, 60 Sup. Ct. 472, 84 L. Ed. 716, construing the Fourteenth Amendment in opinion by Justice Black, wrote in the opinion as follows:

> "The process of repeated questioning took place in the jailer's quarters on the fourth floor of the jail. During the week following their arrests and until their confessions were finally acceptable to the State's Atorney, in the early dawn of Sunday May 21st, the petitioners and their fellow prisoners were led, one at a time, from their cells to the questioning room, quizzed and returned to their cells to await another turn. So far as appears, the prisoners were at no time during the week permitted to see or confer with counsel or a single friend or relative. When carried singly from his cell and subjected to questioning, each found himself, a single prisoner, surrounded in a fourth floor jail room by four to ten men, the county sheriff, his deputies, a convict guard, and other white officers and citizens of the community."

(Continuing the opinion) "The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting, and the wrongs which called it into being, the process provision of the Fourteenth Amendment, just as that in the Fifth, has led few to doubt that it was intended to guarantee procedural standards adequate and appropirate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. The determination to preserve an accused's rights to proceedural due process sprang in a large part from knowledge of the

historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations."

"The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had in their wake of mutilated bodies and shattered minds along the way of the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless and powerless." (Continuing the Chambers opinion.)

"Under our Constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this court than that of translating into living law and maintaining this Constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution, of whatever race, creed or persuasion."

Similar Constitutional questions involving the use in evidence of "sweated" and extorted confessions under like or similar circumstances as appears here, were involved and considered by this Honorable Court in the case of McNabb vs. United States, in an opinion by Mr. Justice Frankfurter, handed down March 1, 1943, Vol. 63 Sup. Ct. Reporter, P. 608, 617, Advance Issue No. 9 of March 15, 1943, wherein was involved rights guaranteed by the Fifth and Fourteenth Amendments, in which opinion reversing the McNabb convictions an extended list of authority and precedent of the Supreme and other courts is cited in support of the McNabb holding, including the Chambers case. We quote below pertinent parts of the McNabb opinion, towit:

> "(1) Concedely, the admissions made by Freeman, Raymond and Benjiman constituted the crux of the Government's case against them, and the convictions cannot stand if such evidence be excluded. Accordingly, the question for our decision is whether these incriminating statements, made under the circumstances we have summarized, were properly admitted. Relying upon the guarantees of the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberay, or property, without due process of law,' the petitioners contend that the Constitution itself forbade the use of this evidence against them. The Government counters by urging that the Constitution prescribes only 'involuntary' confessions, and that judged by appropriate criteria of 'voluntariness' the petitioners admissions were voluntary and hence admissible."
>
> "(2) It is true, as the petitioners assert, that a conviction in the federal courts, the foundation of which is evidence obtained in disregard

of liberties deemed fundamental by the Constitution, cannot stand." (Citing many authorities.)

(The opinion continues) "And this court has, on Constitutional grounds, set aside convictions, both in federal and state courts, which were based on confessions 'secured by protracted and repeated questioning of ignorant and untutored persons in whose minds the power of officers was greatly magnified." (Citing Lisenba vs. California, 314 U. S. 219, 240, 62 Sup. Ct. 280, 291, 86 L. Ed. 166, and divers other cases.)

"(3-5) In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us. For, while the power of this Court to unto convictions in state courts is limited to the enforcement of those 'fundamental principles of liberty and justice' (citing Hebert vs. Louisiana, 272 U. S. 312, 316, 47 Sup. Ct. 103, 104, 71 L. Ed. 270, 48 A. L. R. 1102.

It appears from the McNabb opinion that there was involved a Federal Statute which required the arresting officers of the government to take the accused before a "Committing Officer" but which was not done, just as it was not done in the case at bar, and as required by the Kentucky Code of Criminal Proceedure by Sections 45, 46 thereof, and by Sections 50 and 51 of the Code cited in the foregoing. In considering such failure in the McNabb case, the opinion (Parts 8, 9,) recites:

"The purpose of this impressively pervasive requirement of criminal proceedure is plain. A democratic society in which respect for the dignity of all men is central, naturally guards

against the misuse of the law enforcement process. Zeal in tracking down crime is not itself an assurance of soberness of judgment. Disinteredness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this proceedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime. It reflects not a sentimental but a sturdy view of law enforcement. It outlaws easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection. A statute carrying such purposes is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application."

We observe that the foot note to Part 7 of this McNabb opinion cites as authority Sections 45, 46, supra, of the Kentucky Code of Criminal Proceedure.

A still more recent case is that of Ashcraft et al. vs. State of Tennessee, decided May 1, 1944, No. 391, reported in Advance issue of Supreme Court Reporter of May 15, 1944, at Page 921, Vol. 64, No. 19, wherein the same rule is announced regarding coerced confessions as in the McNabb, Chambers, and other cases cited herein as well as in the foregoing opinions. A distinction to be noted between the Ashcraft case and the case at bar is, that the trial court in the Ashcraft case permitted the trial jury by appropriate instruction to pass on the fact question as to whether the confession was voluntary or coerced or involuntary, whereas in the case at bar the trial court did not by any instruction or admonition allow the jury to decide this vital fact question. But notwithstanding in the Ashcraft case the jury determined this fact question adversely to Ashcraft and Ware, the convictions were reversed by your Honors. It is deemed sufficient to quote syllabus No. 4 of the Ashcraft opinion, towit:

> "The Federal Constitution stands as a bar against the conviction of any individual in an American court by means of a coerced confession."

Many precedents are cited in the footnotes of the Ashcraft opinion from this and many other courts announcing the established principles of law here contended for. Another distinction that may be noted is that Ashcraft's conviction was reversed, although, as appears from the opinion he was an intelligent white man and an experienced and successful business man, whereas the petitioner here is an uneducated young negro.

CONCLUSION

It is therefore submitted that the writ of cetiorari prayed in the petition should issue, and the judgment reversed, and case remanded with directions to be proceeded with according to law.

Respectfully submitted,

ZEB. A. STEWART,
Counsel for Petitioner.

July, 1944.

SEP 22 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944

No. 288

THOMAS BASS, ... Petitioner

vs.

COMMONWEALTH OF KENTUCKY, Respondent

On Petition for Writ of Certiorari to The Court of Appeals of Kentucky

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RESPONSE AND BRIEF FOR RESPONDENT, COMMONWEALTH OF KENTUCKY

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Commonwealth of Kentucky

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(d) Section 7 of the Kentucky Constitution was the only constitutional section, State or Federal, invoked in this case on appeal, and the opinion below held there was no violation of the Kentucky Constitution. This Court will not disturb this decision of the Kentucky Court 8

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Supreme Court of the United States

OCTOBER TERM, 1944

No. 288

THOMAS BASS..... *Petitioner,*

VS.

COMMONWEALTH OF KENTUCKY,.....*Respondent*

ON THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

RESPONSE AND BRIEF FOR RESPONDENT, COMMONWEALTH OF KENTUCKY

JURISDICTION

Respondent, at the outset of its brief, must take issue with the Petitioner's statement that a substantial, or any federal question, was properly, or at all, presented in the court below. When this court examines the briefs and petition for rehearing in the Court of Apeals of Kentucky, it will find that the Petitioner never raised any constitutional question in the lower court, nor objected or excepted to the introduction of the confession so strenuously attacked in his petition herein. The Court of Appeals of Kentucky noted and commented on this in its decision, which we will hereinafter quote.

It was argued that a failure of the lower court to instruct the jury as to whether the confession was voluntary violated Section 7 of the Kentucky Constitution, guaranteeing a jury trial, but that is as far as the issue below was

raised in the Kentucky Court of Appeals. The Court of Appeals fully answered this in its decision.

The question of a violation of the various sections of the Federal Constitution was raised for the first time in the petition to this court. However, we will show there is no merit in this contention even if it had been raised and considered below.

THE ISSUES RAISED AND OPINION OF KENTUCKY COURT

We will, for this court's convenience, quote from the opinion below, Bass v. Commonwealth, 296 Ky. 426; 177 S. W. (2d) 386, rendered by the Chief Justice as follows:

> "It is at once apparent that the evidence was amply sufficient to sustain the verdict. It would have been so even in the absence of the confession. Having admitted the killing, it was incumbent on the appellant to justify it and the jury were not bound to accept his uncorroborated statement that he acted in self-defense, particularly since well established facts, such as the finding of the hammer in the weeds and the torn pocketbook behind the wood box, tended strongly to indicate the falsity of his story. Another such circumstance is that there was no other evidence that Brown had a pistol on his person and the pistol was actually found between the mattress and bed springs in his room.
>
> "It is argued with great earnestness that the trial court was in error in deciding the issue as to the admissibility of the confession and that he should have submitted to the jury the question whether it was obtained in violation of the Anti-Sweating Act, KRS 422.110.
>
> "Passing the question that there was no objection interposed to the introduction of the confession and no motion to exclude it after its introduction, it is clear that the court properly passed on this question himself rather than submit it to the jury. In view of the present statute, KRS 422.110, we are at a loss to understand the insistance with which this question is presented since the statute clearly vests this function

in the trial judge. Prior to the enactment of Chapter 141 of the Acts of 1942 it was the function of the jury to determine, under appropriate instructions, the admissibility of a confession claimed by the accused to have been obtained in violation of the Anti-Sweating Act, but the purpose of the 1942 amendment was to abolish this practice and to vest this function in the trial judge. This identical question was decided in Herd v. Commonwealth, 294 Ky. 154, 171 S. W. (2d) 32."

Then follows the decision that the section of the Kentucky Statutes involved, KRS 422.110, did not violate Section 7, of the Constitution.

Neither the petition herein, page 4, nor the brief, page 9, set out fully the language of the stature, but omit the pertinent part of same, or amendment 1942, whereby the section reads as follows:

"422.110 (1649b-1 to 1649b-3 Confession obtained by "sweating" not admissible. (1) No peace officer, or other person having lawful custody of any person charged with crime, shall attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions, or extort threats or other wrongful means, nor shall the person having custody of the accused permit any other person to do so.

(2) A confession obtained by methods prohibited by subsection (1) is not admissible as evidence of guilt in any court. *The trial judge shall determine the competency and admissibility of any alleged confession under the provisions of this section from evidence heard by him, independent of and without the hearing of the jury trying the case.*"

We have italicized the part of the statute omitted from Petitioner's quotation.

The procedure in the lower court authorized above by statute was literally and conscientiously followed. (Typewritten Transcript, Volume II, pages 32-42). The court's ruling on page 42 reads as follows:

"Thereupon the Court rendered the following opinion:

The Court. After hearing the testimony in chambers, the Court is of the opinion that the confession and statements made by the defendant were entirely voluntary and in no way coerced."

No objection was made to the introduction of the confession, nor exception taken to its introduction, nor motion to exclude it ever made.

The motion for a new trial after conviction did not make it a ground for a new trial (Tr. 7), and this is practically admitted in the petition herein (Page 2), where the only two grounds for a new trial were that the verdict was flagrantly against the evidence, and alleged misconduct of Commonwealth's Attorney in his final argument.

In view of the above, the very ground for the petition herein fails, and it presents no federal question raised below, and the admissibility of the confession was never questioned below.

STATEMENT OF THE CASE

The court need but read the summary of the evidence and the lower court's opinion to see that this was a brutal and unprovoked murder for the purpose of robbery.

The brief and petition refer to Petitioner as "a negro youth from the deep south," when according to his own testimony, he was a man twenty-seven years of age, from North Carolina.

According to his testimony, he seems to have overstayed his leave of absence from his camp upon the idea he could stand the punishment with imprisonment inflicted. The apparent motive for murdering this old inoffensive negro man, sixty years of age, was for money to entertain and regale himself and his women companions, especially with liquor.

As the opinion below states, independent of the confession, his own admission of the killing, with the finding

of the hammer used and torn pocketbook from which the contents had been taken, were enough evidence to take the case to the jury and authorize his conviction. His whole theory of self-defense is refuted by this admission with competent facts otherwise proved. The gun he claims was about to be used by the deceased on him was in fact found after the killing, between the mattress and bed springs in the old man's room. Certainly, the deceased after being struck, could not have put the pistol there. The amount of money found in Petitioner's possession after arrest, corresponded with the amount he confessed taking from the deceased at the time of the striking. The defenseless state of deceased, as shown by his exclamation heard by a witness in an adjoining room, "Aw, don't hit me," further shows a cruel and unprovoked attack.

He admits that the confession is partly true, but seems to especially object to the part stating the purpose of the striking was robbery which he claims was coerced, though admitting that the part as to the killing was substantially true.

The confession does not bear any earmarks of being dictated. It was a plain, simple narrative statement, such as an ordinary man would make.

ARGUMENT AND AUTHORITIES

Petition and brief wholly omit and ignore that part of the Kentucky Statute involved herein, to-wit:

> "The trial judge shall determine the competency and admissibility of any alleged confession under the provisions of this section from evidence heard by him, independent of and without the hearing of the jury trying the case."

As the State Court pertinently remarks in its opinion in view of this statute,

> "We are at a loss to understand the insistence with which this question is presented since this statute clearly vests its function in the trial judge."

The brief for Petitioner even charges the trial court on page 5 of same, with "arrogating to itself the determination of the voluntariness of the alleged confession." This court, no doubt, will agree with the Kentucky Court in its failure to understand the raising of this question, both in the State court and on petition to this court.

Under the statute, it was the mandatory duty of the lower court to decide this question which it did. In view of this statute, to require the court to instruct the jury to determine whether the court's ruling as a matter of law was proper, seems an absurdity, but this is what the argument of Petitioner amounts to.

This is no new question as a dozen or more states, in the absence of a statute such as the Kentucky Statute, have held that whether a confession is voluntary or not is a question of law subject to exception and appeal if erroneous, and it was improper to instruct the jury to determine this question of law. One of the leading cases is State of New Jersey v Eugene Compo, 108 N. J. L. 499; 158 Atl. 541; 85 A. L. R. 866, where the New Jersey Supreme Court decided this identical question as follows:

> "The charge of the court, in so far as it did not direct the jury to reject the confession if they believed the same was not voluntary, is before us and under the decisions of this court such an instruction would have been erroneous. If the jury did not believe in the truth of the confession, they could treat it in the same manner as any other piece of evidence which they disbelieved, but they could not decide to reject, as evidence, that which the court had properly admitted. Of course, the determination of the weight and credibility of evidence is always for the jury, and the trial judge left that question to the jury.
>
> The judgment is affirmed."

In People v. Fox, 319 Ill. 606, 150 N. E. 347, where the same question was presented, the Illinois Supreme Court held as follows:

> "While the jury may consider the circumstances under which a confession was made, in order to deter-

mine the credit to be given to it (People v. Gukouski (1911) 250 Ill. 231, 95 N. E. 153, Ann. Cas. 1912B 297; Zukerman v. People (1904) 213 Ill. 114, 72 N. E. 741), on elementary principles defining the functions of judge and jury, the question of competency of the confession must not be submitted to the jury. To a like effect, see People v. Costello (1926) 320 Ill. 79. 150 N. E. 712."

In Moss vs. State, 19 Ala. App. 85, 96 So. 451, wherein a writ of certiorari was denied, the Alabama court reviewed its former decisions, and again stated and laid down the rule in Alabama that the voluntariness of a confession was solely for the court, holding erroneously the charge of the trial judge authorizing the jury to reject and disregard the confession if they found it to be not voluntary.

Again in Indiana, in Hauk v. State, 148 Ind. 238, 46 N. E. 127, it was held upon the same question that the voluntariness of a confession was only addressed to the court, and the defendant was not entitled to have the jury pass on it. This same rule is laid down in a dozen or more states in addition to the foregoing, and we will not burden this court with other state authority on the matter.

Some states take an opposite view of this, where there is no statute on the question, but Kentucky, which was formerly in that class, has now departed from it, and is in line with foregoing cases.

This court will note that in the opinion complained of, the Kentucky court reviews the Kentucky decisions and holds that the orthodox rule was to the effect that the voluntariness of the confession was for the court, and not the jury. However, in later decisions, the Kentucky Court took what the opinion states was the "heterodox" rule, and it would seem even in the absence of the mandatory statute, the Kentucky Court intended to go back to the old orthodox rule wherein the voluntariness of a confession was a question of law for the court and not a question of fact for the jury. Whether this conclusion is justified or

not, the statute is conclusive and binding, and the construction of a statute by a state court is followed by this court. This is the general rule.

This Court will notice that every Kentucky case cited in Petitioner's brief were also cited in the opinion under the "heterodox" rule, and decided prior to the Statute.

This Court can see that Sections 7 and 11 of the Kentucky Constitution are practically the same as the 5th and 6th amendments of the Federal Constitution. Both guarantee to the accused a jury trial with the requirement that he be confronted with his witnesses and not required to incriminate himself, and that the trial be by an "impartial jury of the vicinage," not "imperial jury of the viccinage," as quoted on Page 7 of the Petitioner's brief.

This Court will bear in mind that only Section 7, of the Kentucky Constitution was involved in the trial either in the lower court or the Kentucky Court of Appeals. No mention was made in the petition for rehearing in the Kentucky Court of Appeals of any other section than Section 7. As we have stated above, the first mention of the Federal sections is in the petition for writ of certiorari in this court, and we insist, in view of this failure to present this question, the petition should be denied. The Kentucky Court of Appeals held that it did not violate Section 7 of the Kentucky Constitution, and that was the only question raised, and upheld the Kentucky Statute in this regard.

It is now insisted that Amendment XIV of the Federal Constitution was violated, in that the Petitioner was denied due process of law, and several cases of this Court are cited, none of which have a bearing on this case, nor are similar in fact to this case.

There is a difference in the consideration by this Court of a conviction in a Federal Court and conviction in a State Court where raised on petition for writ of certiorari. In criminal convictions in the State Court, the power of this court is limited to the enforcement of fundamental principles of liberty and justice, while in reviewing the convic-

tions in a Federal Court this court is not confined to ascertainment of constitutional validity. The case of McNabb vs. U. S., 318, U. S. 332, 63 Sup. Ct. 608, was a review of a conviction in the Federal Court, and in the McNabb Case, this court followed and cited the case of Hebert v. La. 272 U. S. 312, 47 Sup. Ct. 103. This Court can see under the facts of this case in the matter of the confession, there was no violation of the "fundamental principles of liberty and justice," and the trial court and the Kentucky Court of Appeals so expressly held.

One of the cases relied on in Petitioner's brief is Ashcraft v. State of Tennessee, 64 Sup. Ct. 921, which this court did review. Neither the lower court nor the Supreme Court of Tennessee passed on the question of whether the confession was freely and voluntarily made. We will quote from this opinion the following language:

> "The record discloses that neither the trial court nor the Tennessee Supreme Court actually held as a matter of fact that petitioners' confessions were "freely and voluntarily made." The trial court heard evidence on the issue out of the jury's hearing, but did not itself determine from that evidence that the confessions were voluntary. Instead it over-ruled Asheraft's objection to the use of his alleged confession with the statement that, "This Court is not able to hold, as a matter of law, that reasonable minds might not differ on the question of whether or not that alleged confession was voluntarily obtained." and it likewise over-ruled Ware's objection to use of his alleged confession, stating that "the resonable minds of twelve men might * * * differ as to * * * whether Ware's confession was voluntary, and * * * therefore, that is a question of fact for the jury to pass on." Nor did the State Supreme Court review the evidence pertaining to the confessions and affirmatively hold them voluntary. In sustaining the petitioners' convictions, one Justice dissenting, it went no further than to point out that, "The trial judge * * * held * * * he could not say that the confessions were not voluntarily made and, therefore, permitted them to go to the jury," and to declare that it, likewise,

was "unable to say that the confessions were not freely and voluntarily made."

This alone distinguishes the case at bar from the Ashcraft case which is no precedent in this case.

Petitioner also cites and quotes from Chambers v. State of Florida, 309 U. S. 227, 60 Sup. Ct. 472. The Chambers case presented a most unusual and extreme condition of facts. In that case, the accused was grilled for five days and all of one night of the fifth day. They denied their guilt. There were threats of mob violence and they were in constant fear of mob violence. It seems that the question of confession was not passed on at the first trial in the lower court, but came up on a writ of coram nobis, and the Supreme Court of Florida reversed the case twice.

This Court in granting the petition and ordering a trial, based it upon the conclusion "the undisputed facts showed compulsion was applied". There is no such undisputed facts showing a compulsion in the case at bar. In fact, all the proof before the lower court was that it was a voluntary confession and the defendant never excepted to the orders of the court to this effect, but on the trial, repudiated a part of the confession and claimed the part pertaining to robbery was coerced. There is no parallel or similarity between this case and the facts in the Chambers case.

It was for the jury to determine under his testimony at the trial, whether to believe his statement on the trial or the statement in the confession, a pure question of credibility as any other question of fact to be left to the jury.

Let this Court bear in mind in Kentucky there is a direct statute on this, while in the cases cited by Petitioner, no statute was involved. We have reviewed the decisions of this court to show they are wholly inapplicable to the case at bar.

For the first time in this petition, the question is raised as to the legality of the arrest, and certain sections of the Criminal Code of Kentucky are cited. The legality and reg-

ularity of the arrest were never questioned in the lower court, nor was the question ever raised in the Kentucky Court of Appeals. There is nothing to show that the Petitioner objected to the arrest or questioned its regularity, or the fact he was not taken before the examining court. Petitioner's attorneys seek to raise this for the first time in this petition which, of course, cannot be done as no opportunity was given the lower court or the Kentucky Court of Appeals to pass on it, and it is purely an afterthought as we can properly and reasonably conclude.

CONCLUSION

Respondent, The Commonwealth of Kentucky, therefore, respectfully submits that no Federal question was ever raised, either in the trial court or the Kentucky Court of Appeals; that the only question raised, to-wit, the violation of Section 7, of the Kentucky Constitution, and whether the Kentucky Statute violated this section was expressly passed on in the Court of Appeals of Kentucky. This Court will follow a State Supreme Court's construction of the State's own statutes.

The record further shows that the punishment inflicted and upheld, while extreme, was merited.

We, therefore, respectfully ask that the petition for certiorari be denied.

Respectfully submitted,

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